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Contractual Limitations of Liability and their Impact on Tort Claims

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Abstract: By concluding a contract, parties intend to allocate the contractual risk between them. This means that parties must anticipate any future adverse result and determine whether a party will have to cover any loss incurred by the other party as a result of performance or, more often, bad performance. In sales contracts, for example, parties may decide to exclude any liability for defects of goods, especially when selling used goods or for other reasons, or at least to limit liability for some defects or to limit types of possible claims. Similarly, in mergers and acquisitions, parties very strictly determine what is known by the seller in a disclosure letter and give the buyer access to some information in a data room prior to the conclusion of the contract to limit liability to the unknown and the non-disclosed.[1]

For each party, much of contractual drafting boils down to limiting risk to the greatest extent possible, or at least to ensure compensation for any risk incurred. If parties are on an equal footing, this may lead to an equitable allocation of risk and a balanced contractual liability regime. Contractual limitations of liability are, therefore, part of this process of adequate allocation of risks.

In this contribution, I will briefly address three issues. First, I will look at which principles are applicable to the validity of limitations of contractual liability (I) and then determine to what extent these principles apply to tort claims (II). This will finally lead me to determine whether the Principles of European Tort Law (PETL) need to be supplemented by a further rule dealing with the validity of contractual clauses limiting liability in tort (III).

1 *CA Hill*/*BJM Quinn*/*SD Sollomon*, Mergers and Acquisitions, Law, Theory, and Practice (2019) 372–403; *R Tschäni*/*H-J Diem*/*M Wolf* (eds), M&A-Transaktionen nach Schweizer Recht (3rd edn 2021) 209–215 (paras 420–431); O Duys/K Henrich in: W Hölters (ed), Handbuch Unternehmenskauf (8th edn 2015) ch 16, paras 16.108–16.116.

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I The validity of contractual limitations of liability

The validity of contractual provisions on limitations of liability is subject to general provisions, applicable to all contracts (A), but also to specific provisions mainly applicable to standard terms and conditions (B). These limitations aim at ensuring that the fundamental ideas of consent and balance are respected.

A The general limitations

After presenting the situation based on Swiss law (1), I will focus briefly on some aspects in EU law and soft law principles (2).

1 Swiss law

Let me first take the example of Swiss law. It provides both for generic and specific limits to provisions on contractual limitations of liability.

Article 27 para 2 Swiss Civil Code (SCC) provides (in its English translation) that: 'No one may deprive themselves of their personal freedom or restrict themselves in the use of it to a degree which violates the law or public morals'. Any provision contradicting the law or public morals is null and void pursuant to art 20 Swiss Code of Obligations (CO). In Switzerland, provisions that exclude liability in case of bodily or personal injuries have been considered null and void by a majority of scholars,[2] and also by some older case law.[3] Some scholars, however, adopt a more nuanced approach, suggesting that such limitation or exclusion may be valid in principle,[4]

2 See already *H Deschenaux/P Tercier*, La responsabilité civile (2nd edn 1982) 213; *M Buol*, Beschränkung der Vertragshaftung durch Vereinbarung, thesis (Fribourg 1996) para 336; *C Chappuis*, La limitation de la responsabilité en matière de préjudices corporels, in: C Chappuis/F Werro/P Pichonnaz (eds), Le préjudice corporel: bilan et perspectives (2009) 297ff; *P Gauch/WR Schluep/J Schmid/S Emmenegger*, Obligationenrecht Allgemeiner Teil (11th edn 2020) para 3094; *EA Kramer* in: Berner Kommentar (BKomm) art 19–20 CO para 212; *J Schmid*, Freizeichnungsklauseln, in: H Honsell/W Portmann/R Zäch/D Zobl (eds), Aktuelle Aspekte des Schuld- und Sachenrechts, FS für Heinz Rey (2003) 316f; *P Tercier/P Pichonnaz*, Le droit des obligations (6th edn 2019) para 1361; *F Werro*, La responsabilité civile (3rd edn 2017) para 419, 1289; *C Widmer Lüchinger/W Wiegand* in: Basler Kommentar, Obligationenrecht I (BSK OR-I), Art. 1–529 OR (7th edn 2021) art 100 CO no 4.

3 Not very clear: FT, Decision 7.2.1933, SJ 1934 at 1/10, reason 2b; DFT (Decision of the Federal Tribunal) 60/1944 II 341/345 reason 3.

4 *B von Büren*, Schweizerisches Obligationenrecht, Allgemeiner Teil (1964) 407 fn 214; *RH Weber/S Emmenegger* in: BKomm, art 100 CO para 152.

but subject to limitations,[5] such as death or severe injuries,[6] injuries that are not inherent to the activity or which were inflicted in violation of the rule of the game or the rules of art,[7] or that are deprived of any reasonable aim.[8]

The invalidity of an exclusion of liability for personal injuries is also part of a specific provision, inherited from EU law; art 16 Federal Package Travel Act[9] provides (in its English translation): 'Liability for personal injury resulting from the non-fulfilment or improper fulfilment of the contract cannot be limited by contract.' Similar provisions exist in further Swiss Acts (Road Traffic Act, art 87 I;[10] Product Liability Act, arts 8 and 1 I,a[11]).

In some situations, excluding certain types of minor bodily or personal injuries may not be problematic.[12] One could think of a sport for which some personal injuries may occur in the normal course of play, such as boxing or ice-hockey. A contractual provision excluding liability of a fighter boxing against another fighter at a tournament for foreseeable or 'ordinary' personal injuries will be valid. To limit or exclude contractual liability, one would first have to consider that *there is* contractual liability. This would be the case when contractual (or legal) obligations have been breached by one party causing such personal injury.[13] One could, of course, also consider that regulations according to which a sport is practised might play the same role as a contractual clause.

Exclusions or limitations of contractual liability which infringe art 27 para 2 CCS are in practice limited to bodily injuries; however, in contractual situations, this provision could also apply to mere patrimonial losses, as in the well-known *Matuzalem* case, decided by the Federal Tribunal in a sports law case.[14]

Contractual liability for patrimonial loss may be limited by contractual provisions, provided they do not infringe art 100 para 1 CO. This mandatory provision provides (in its English translation): 'An agreement made in advance excluding liability for unlawful intent or gross negligence is void'. It is, therefore, a contractual limitation of liability that is not linked to the type of damage, but to the intensity of

5 *M Hochstrasser*, Freizeichnung von der Haftung für Personenschäden, Aktuelle Juristische Praxis (AJP/PJA) 2016, 910–920; *Werro* (fn 2) para 444.

6 *M Hochstrasser*, Freizeichnung zugunsten und zulasten Dritter, thesis (Zurich 2006) para 113.

7 *Werro* (fn 2) paras 419, 421, 444; *Hochstrasser* (fn 6) para 111.

8 *Werro* (fn 2) paras 419, 421, 444; *Hochstrasser* (fn 6) para 111.

9 Federal Act on Package Travel of 18 June 1993 (RS 944.3).

10 Road Traffic Act (LCR; SC [Systematic Collection] 741.01).

11 Product Liability Act (LRFP; SC [Systematic Collection] 221.112.944); see *Werro* (fn 2) para 734f.

12 *Werro* (fn 2) para 444f, 1293–1297f.

13 *W Fellmann*/*A Kottmann*, Schweizerisches Haftpflichtrecht, vol I (2012) para 387f; *Werro* (fn 2) para 444.

14 DFT 138/2012 III 322 reason 4.1–4.3.

breach of a contractual or legal norm of behaviour. The idea is that one cannot exclude liability for intentional harm, to which gross negligence has been added in order to avoid difficult distinctions between what was really intended and what was not but could have been.

In the case of performance through an auxiliary (agent), art 101 para 3 CO sets a similar limit, which remains, however, at the discretion of the judge. This article reads as follows (in its English translation): 'However, if the waiving party is in the service of the other party or if the liability arises from the operation of an officially licenced trade, liability may be waived at most for slight negligence.' Again, the limitations are of a contractual nature and exclude liability for unlawful intent or gross negligence. I will not discuss all the intricacies of this provision, though, in practice, it is a much more important provision than art 101 para 1 CO. What is important, however, is to stress that this provision is also based on the degree of negligence.

Furthermore, one can address the exclusion of liability provision of art 199 CO, which is central for sales contracts. It reads (in its English translation) as follows: 'An agreement on the exclusion or limitation of a warranty is invalid if the seller has fraudulently concealed the defects from the buyer'. Some scholars consider art 199 CO to be a *lex specialis* to art 100 para 1 CO.[15] However, the majority of scholars rightly consider that even if art 199 CO is applicable, art 100 para 1 CO may also remain applicable, as it may be broader in its restrictions.[16] Indeed, if art 100 para 1 CO is grounded on the intensity of negligence (or the degree of it), art 199 CO is based on the idea that one should be allowed to exclude one's liability if one knew about the defect; art 199 CO is therefore based on the idea of knowledge and not of intent.[17] This difference, although slight, may play a role in some instances. The Federal Tribunal has, however, left the question of concurring application undecided.[18]

Fraudulent concealment of a defect may also be committed by omitting to declare a defect when there is a duty to inform about it.[19] The Federal Tribunal has subsumed under 'fraud' also *dolus eventualis*, ie the situation in which the seller does not check the existence or absence of a defect, accepting the risk that such

15 *H Honsell* in: Basler Kommentar, Obligationenrecht I (BSK OR-I) (7th edn 2021) art 199 CO para 1.

16 *L Thévenoz*, Commentaire Romand, Code des obligations, vol I (CR CO-I) (3rd edn 2021) art 100 CO para 32; *Gauch/Schluep/Schmid/Emmenegger* (fn 2) para 3082; *Buol* (fn 2) paras 281ff, 372f; BKomm/*Weber-Emmenegger* (fn 4) art 100 CO para 39f.

17 BSK OR-I/*Honsell* (fn 15) art 199 CO para 7; FT, Decision 4A_196/2011 (4.7.2011); FT, Decision 4A_141/2017 (4.9.2017).

18 DFT 126/2000 III 59 reason 4a; DFT 107/1981 II 161, reason 7b.

19 FT, Decision 4A_535/2021 (06.05.2022), reason 6.1; FT, Decision 4A_261/2020 (10.12.2020), reason 7.2.2; FT, Decision 4C.16/2005, c. 1.5 (13.7.2005); FT, Decision 4C.205/2003 (17.112003) reason 3.3.2; FT, Decision 4C.152/2003 (29.8.2003) reason 3.1; DFT 116/1990 II 431 c. 3a; DFT 114 II 239 reason 5a/bb.

defect may exist and that it will not be declared.[20] To this extent, art 199 CO also deals with the degree of negligence.

Article 14 of the Package Travel Directive[21] regulates the limitations of liability imposed by an organiser. Among other aspects, art 14 para 4 provides (in its English translation) that 'insofar as international conventions binding the Union limit the extent of or the conditions under which compensation is to be paid by a provider carrying out a travel service which is part of a package, the same limitations shall apply to the organiser ...'. Where not governed by an international convention, or where no Member States have implemented such a limitation imposed by an international convention, 'the package travel contract may limit compensation to be paid by the organiser as long as that limitation does not apply to personal injury or damage caused intentionally or with negligence and does not amount to less than three times the total price of the package'.

As for Swiss law, the consequence is that *personal injury is excluded* from any limitation, but the same is true for *damage caused intentionally or with negligence*. This means that the same provisions also entail a limitation based on the intensity of the breach of the duty to behave in a specific way.

2 EU law and soft principles

The Draft Common Frame of Reference (DCFR) primarily entails limitations of liability for specific contracts. Here are some examples:

In *sales contracts*, one finds a general limit on limitations of remedies. According to art IV. A.–4:101 DCFR, under the title 'Limits on derogation from remedies for non-conformity in a consumer contract for sale', one reads the following:

> Art IV. A. – 4:101: Limits on derogation from remedies for non-conformity in a consumer contract for sale
>
> In a consumer contract for sale, any contractual term or agreement concluded with the seller before a lack of conformity is brought to the seller's attention which directly or indirectly waives or restricts the remedies of the buyer provided in Book III, Chapter 3 (Remedies for

20 BSK-OR I/*Honsell* (fn 15) art 199 CO para 7; FT, Decision 4A_196/2011 (4.7.2011); FT, Decision 4A_141/2017 (4.9.2017).

21 Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC [2015] OJ L 325/1.

> Non-performance), as modified in this Chapter, in respect of the lack of conformity is not binding on the consumer.

The aim is, therefore, to protect the weaker party and ensure some balance in the contractual relationship.

A similar concern is articulated in art IV.A.–4:202 DCFR, under the title 'Limitation of liability for damages of non-business sellers'. The limitation of liability is, of course, knowledge by the seller of any defect.

> Art IV.A.–4:202: Limitation of liability for damages of non-business sellers
>
> If the seller is a natural person acting for purposes not related to that person's trade, business or profession, the buyer is not entitled to damages for lack of conformity exceeding the contract price.
>
> The seller is not entitled to rely on paragraph (1) if the lack of conformity relates to facts of which the seller, at the time when the risk passed to the buyer, knew or could reasonably be expected to have known and which the seller did not disclose to the buyer before that time.

Finally, one sees that an exclusion or limitation is allowed when it is not an imbalanced contractual relationship, as for example in the guarantees for sales contracts: Art IV.A.–6:106: Exclusion or limitation of the guarantor's liability

> The guarantee may exclude or limit the guarantor's liability under the guarantee for any failure of or damage to the goods caused by failure to maintain the goods in accordance with instructions, provided that the exclusion or limitation is clearly set out in the guarantee document.

For other more specific contracts, the limitation of liability is valid where it does not exclude liability for intentional or gross negligent conduct/omissions. Indeed, in those situations, such conduct/omissions would amount to an abusive conduct.

Thus, in processing contracts, art IV.C.–4:108 DCFR ('Limitation of liability') reads as follows:

> Art IV.C.–4:108: Limitation of liability
>
> In a contract between two businesses, a term restricting the processor's liability for non-performance to the value of the thing, had the service been performed correctly, is presumed to be fair for the purposes of II. – 9:405 (Meaning of 'unfair' in contracts between businesses) except to the extent that it restricts liability for damage caused intentionally or by way of grossly negligent behaviour on the part of the processor or any person for whose actions the processor is responsible.

The same holds for storage contracts (art IV.C.–5:109 DCFR 'Limitation of liability')

> Art IV.C.–5:109: Limitation of liability
>
> In a contract between two businesses, a term restricting the storer's liability for non-performance to the value of the thing is presumed to be fair for the purposes of II. – 9:405 (Meaning of 'unfair' in contracts between businesses), except to the extent that it restricts liability for damage caused intentionally or by way of grossly negligent conduct on the part of the storer or any person for whose actions the storer is responsible.

A similar provision applies also to design contracts (art IV.C.–6:107 DCFR 'Limitation of liability')

> Art IV.C.–6:107: Limitation of liability
>
> In contracts between two businesses, a term restricting the designer's liability for non-performance to the value of the structure, thing or service which is to be constructed or performed by or on behalf of the client following the design, is presumed to be fair for the purposes of II. – 9:405 (Meaning of 'unfair' in contracts between businesses) except to the extent that it restricts liability for damage caused intentionally or by grossly negligent conduct on the part of the designer or any person for whose actions the designer is responsible.

In the Digital Content Directive (DCD),[22] the only provision that may deal with limitation of liability is art 22 DCD, which deals with the mandatory nature of the provisions. Any limitations of liability for defects, for example, would therefore be void. The idea is again the high level of protection provided by the Directive:

> Article 22 Mandatory nature
>
> Unless otherwise provided for in this Directive, any contractual term which, to the detriment of the consumer, excludes the application of the national measures transposing this Directive, derogates from them or varies their effects before the failure to supply or the lack of conformity is brought to the trader's attention by the consumer, or before the modification of the digital content or digital service in accordance with Article 19 is brought to the consumer's attention by the trader, shall not be binding on the consumer.

The same is true for the Sale of Goods Directive (SGD),[23] at art 21, which reads as follows:

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22 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L 136/1.

23 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L 136/ 28.

> Article 21 Mandatory nature
>
> Unless otherwise provided for in this Directive, any contractual agreement which, to the detriment of the consumer, excludes the application of national measures transposing this Directive, derogates from them, or varies their effect, before the lack of conformity of the goods is brought to the seller's attention by the consumer, shall not be binding on the consumer.

Obviously, these rules must be transposed into Member State law.

B Limitations for standard terms

Both Swiss and EU law provide for some limitations as to the unfairness of Standard Terms clauses in business-to-consumer contracts, which have not been negotiated.[24] Some Member States have also expanded such protection to business-to-business contracts, or at least provided for a certain protection, however less stringent, based on the doctrine of surprising terms, as is the case under Swiss law, for example.[25]

Article 8 Swiss Unfair Competition Act (UCA)[26] provides for a similar protection as that provided for by art 3 Unfair Contract Term Directive (UCTD),[27] which was a direct source of inspiration,[28] by stating that 'a person acts unfairly in particular if they use general terms and conditions of business that provide for a considerable and unjustified imbalance between contractual rights and contractual obligations to the prejudice of consumers in a manner that is in breach of good faith'.[29] Unlike EU law, Swiss law does not have, however, a grey or black list of unfair terms, but the similarity in wording between art 3 UCTD and art 8 UCA may justify taking into account the EU grey list (Annex to the UCTD 'Terms referred to in Article 3[3]').[30]

24 *A Morin*, Les clauses contractuelles non négociées, Zeitschrift für Schweizerisches Recht (ZSR/RDS) 2009 I, 497–528, 502.

25 *P Pichonnaz*, Art 8 LCD, in : V Martenet/P Pichonnaz (ed), Commentaire Romand, Loi contre la concurrence déloyale (LCD) (2017) art 8 LCD para 93ff.

26 Federal Act of 19 December 1986 on Unfair Competition (Unfair Competition Act, UCA), Systematic Collection (SC) 241.

27 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contract, [1993] OJ L 95/29.

28 Message of the Swiss Federal Council of 2 September 2009 [09.069], Federal Papers (FF) 2009 I 5561.

29 Unofficial English translation provided by the website of the Federal administration, available at <https://www.fedlex.admin.ch/eli/cc/1988/223_223_223/en>.

30 For a general overview of the Judicial Review of Commercial Contracts, see *P Pichonnaz*, Switzerland, in: H Wais/T Pfeiffer (eds), Judicial Review of Commercial Contracts, A Comparative Handbook (2021) 309–330; as well as *Morin*, ZSR/RDS 2009 I, 497–528.

Pursuant to art 1(a) Annex UCTD, contractual terms 'excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier' may be regarded as unfair, unless justified as regards the whole contract. Under Swiss law, such clause would already be null and void as being considered to infringe personality rights (art 27 SCC; see above I/A/1).

Similarly, art 1(b) Annex UCTD regards as presumably unfair such contractual clauses which inappropriately exclude or limit 'the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him'.

Article 1(a) Annex UCTD has also been incorporated into art II.-9:410(1)(a) DCFR, which reads as follows:

> Art II.-9:410(1)(a) DCFR [Terms which are presumed to be unfair in contracts between a business and a consumer]
>
> (1) A term in a contract between a business and a consumer is presumed to be unfair for the purposes of this Section if it is supplied by the business and if it
>
> (a) excludes or limits the liability of a business for death or personal injury caused to a consumer through an act or omission of that business;

The aim of this provision is to ensure that consumers are well protected. Of course, further limitations may derive from less intrusive unfair terms, such as a shift of liability if such terms are considered as unfair in the contract as a whole.

II The applicability of these limitations to tort claims

Under Swiss law, the question of whether contractual limitations of liability may apply to tort claims is disputed among scholars.[31] The Federal Tribunal appears to

31 *Werro* (fn 2) para 3; *C Chappuis*, La limitation de la responsabilité en matière de préjudices corporels, in : C Chappuis/F Werro/P Pichonnaz (eds), Le préjudice corporel : bilan et perspectives (2009) 291 ff; also *Buol* (fn 2) para 150 ff.

accept the idea of extending such limitations also to tort claims,[32] as does a majority of scholars.[33] Let us briefly examine some of these questions.

A Exclusion of contractual liability for tort claims

An application of such (valid) contractual liability limitation to a tort claim, however, raises many issues.

1 Concurring claims in tort and in contract

According to case law, the same act may trigger liability in contract and in tort; causes of action may be one or the other or both concurrently. For example, under Swiss law, the victim may concurrently file a case on both grounds (*concours objectif d'actions* or *Anspruchskonkurrenz*), or even file one claim after the other on these two causes of action.[34] The rationale of these concurring causes of action is to allow the victim to choose the most favourable regime in a concrete case; the victim can, therefore, decide upfront for one or the other regime, or use both concurrently.[35]

This is not necessarily the case in all systems. For example, under French law, the prevailing view of *non-cumul des responsabilités* or rather *non-option* means that no tort claim is available if a contractual claim is possible.[36]

If there is an exclusion, or a subsidiarity principle, in favour of the contractual source, the question of applicability of contractual limitation to tort claims becomes moot, at least to the extent that it also applies when the contractual liability has been limited.

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32 DFT 120/1994 II 58/61, reason 3a (*obiter dictum*); DFT 107/1981 II 161/168 reason 8a; question was left open at DFT 111/1995 II 471/480 reason 11; DFT 60/1944 II 341/345 reason 3.

33 BSK OR-I/*Lüchinger-Wiegand* (fn 2) art 100 CO para 3; CR CO I/*Thevenoz* (fn 16) art 100 CO no 12. BKomm/*Weber-Emmenegger* (fn 4) art 100 CO para 49ff.

34 Very recently DFT 148 III 401, reason 3.1; *Tercier*/*Pichonnaz* (fn 2) para 1287; *F Werro*/*V Perritaz* in: Commentaire Romand, Code des obligations, vol I (CR CO-I) (3rd edn 2021) art 41 CO para 3; CR CO-I/*Thevenoz* (fn 16) Intro ad Art. 97–109 CO, para 13.

35 DFT 148 III 401, reason 3.1.

36 Cf *P Espagnon*, La règle du non-cumul des responsabilités délictuelle et contractuelle (1980); *P Brun*/*F Leborgne*, Le principe de la distinction entre responsabilité délictuelle et responsabilité contractuelle, in: Mazeaud et al (eds), Droit de la responsabilité (2006) para 170f; *P Le Tourneau* (ed), Droit de la responsabilité et des contrats, Régimes d'indemnisation (13th edn, 2023) paras 3213.310-3213–354; see also *B Zirlick*, Freizeichnung von der Deliktshaftung, Haftungsbeschränkung und -ausschluss im ausservertraglichen Bereich, thesis Bern (2003) 91.

2 Is the tort liability regime of a mandatory nature?

Indeed, one cannot discuss the issue of extension of a contractual limitation of liability to torts without asking the very question of whether tort liability is of a mandatory nature, thus prohibiting *per se* any *ex ante* exclusion.[37]

The question of the mandatory nature of tort liability is, however, only significant for non-bodily injuries (see above A.2). Further, contractual limitations of liability to torts should certainly be excluded for intentional and grossly negligent actions or omissions. Let us examine now these various questions.

As to damage to goods, one can recall the passage of the famous Roman jurist, Ulpian, published by Justinian in his Digest. In Digesta (D) 9,2,27,29, Ulpian explains that craftsmen, knowing that certain objects on which they had to work could easily break, excluded their liability by way of a contractual clause. This exclusion, says Ulpian, was valid both for the action for the contract of work (*actio locati*) and for the action from the *lex Aquilia* (‘*et ideo plerumque artifices convenire solent, cum eiusmodi materiae dantur, non periculo suo se facere, quae res ex locato tollit actionem et Aquiliae*’).[38] This is not the place to present the entire evolution of the debate that followed, including in the 19th century in Germany, where the question as to whether statutory limitations of liability for some contracts would also be applicable to the concurring tort action was the subject of intense debate.[39] Some codifica-

37 *Zirlick* (fn 36) 23ff; *M Kamm*, Freizeichnungsklauseln im deutschen und im schweizerischen Recht: Ein Vergleich (1985) 85; *J Schmid*, Die Folgen der Nichterfüllung, in: P Gauch/J Schmid (eds), Die Rechtsentwicklung an der Schwelle zum 21. Jahrhundert, Symposium zum Schweizerischen Privatrecht (2001) 301–322, part 318.

38 Digesta (D) 9, 2, 27, 29 (*Ulpianus libro 18 ad edictum*) ‘Si calicem diatretum faciendum dedisti, si quidem imperitia fregit, damni iniuria tenebitur: si vero non imperitia fregit, sed rimas habebat vitiosas, potest esse excusatus: et ideo plerumque artifices convenire solent, cum eiusmodi materiae dantur, non periculo suo se facere, quae res ex locato tollit actionem et Aquiliae.’, translated in *A Watson* (ed), The Digest of Justinian, vol I (1985) by *Colin Kolbert* as follows: ‘If you hand over a cup for filigree work to be done, the jeweler will be held liable if he breaks it through lack of skill, but if it breaks not through his lack of expertise but because it has weakening cracks he can be exonerated; and accordingly, craftsmen usually contract when things of this sort are entrusted to them that the work shall not be done at their risk, and this provision excludes their liability both under the contract for their professional services and under the *lex Aquilia*’.

39 *Zirlick* (fn 36) 26ff; actual situation, see *C Grüneberg* (ed), Bürgerliches Gesetzbuch (81st edn 2022) § 276 para 35.

tions underlined the mandatory nature of tort law,[40] others did not – at least not explicitly – while being aware of the debate.[41]

The Swiss Code of Obligations sometimes makes explicit reference to the mandatory nature of some provisions, but does not do so for tort law. It does not set a general principle in art 19 para 2 CO either, but refers rather to the dichotomy between the mandatory and dispositive nature of provisions. It is, therefore, *a matter of interpretation* to decide the very nature of tort law provisions. The Federal Tribunal has in some cases accepted the idea of applying contractual limitation clauses to tort claims, thus implicitly admitting the dispositive nature of tort law,[42] but has decided differently in others, excluding in principle any limitation, be it unilateral or bilateral[43] or even leaving the question open.[44] One must say, however, that apart from some punctual (and rather old) cases in which the mandatory nature of tort law in Swiss law was affirmed, most of the cases either left the question open or admitted the dispositive nature of tort law, by accepting that a valid contractual limitation clause would also be applicable to tort claims.

Swiss scholars are divided on this question,[45] but a majority are in favour of the dispositive nature of some aspects of tort liability, invoking either consent or autonomy of will in the allocation of risk, which should not depend on the potential application of contract or tort law.[46] Some scholars have invoked a unity argument,

40 See among others the Zurich Civil Code (PGB) of 1853–1855; Saxon Civil Code (Sächsisches BGB) of 1863 and the Dresdner Draft of 1866; see also *Zirlick* (fn 36) 30.

41 See among other the Austrian Civil Code (ABGB) of 1811; Bernese Civil Code of 1826–1831; the draft Civil Code of Basel-City of 1865 or the (old) Federal Code of Obligations of 1881, as well as the German Civil Code (BGB) of 1896; see also *Zirlick* (fn 36) 30.

42 See for such an idea *Zirlick* (fn 36) 38; see FT, Decision of 7.2.1933, SJ 1934, 11: 'Du fait que le législateur a jugé nécessaire d'édicter ces défenses, on peut conclure qu'en principe la *renonciation est licite* même s'il s'agit de la responsabilité purement causale (art 58 CO) et que le juge a la faculté d'en tenir compte. Il lui appartient dès lors de dire dans chaque cas particulier si, au vu des circonstances, la renonciation anticipée aux droits découlant de l'art. 58 CO justifie le *rejet de la demande ou seulement une réduction des dommages-intérêts* en vertu de l'art. 44 CO' (highlighted by us); DFT 60/1944 II 344 goes into the same direction and confirms it. See also a confirmation of a Geneva case, that art 58 CO is not of 'ordre public' (DFT 8.9.1943, cited by *R Brehm* in: Berner Kommentar (BKomm) (5th edn 2021) art 58 CO para 134f; DFT 94/1968 II 197, implicitly accepts the idea of a valid limitation of liability for tort; see also DFT 107/*1981* II 161/168 and DFT 120/1994 II 58/61 see *Zirlick* (fn 36) 41.

43 FT, Decision 3.10.1933, RSJ/SJZ 1934/1935, 186ff; FT, Decision 4.11.1980, SJ 1981, 433ff and 438, in which the contractual limitation was not accepted for the tort claim; it was however a case of personal injury.

44 DFT 91/1965 I 237 reason 4; DFT 111/1985 II 471/479.

45 For a survey of positions, see *Zirlick* (fn 36) 44ff.

46 BSK OR-I/*Lüchinger-Wiegand* (fn 2) art 100 CO para 3; BKomm/*Brehm* (fn 42) art 41 CO para 230c (and refs); *Zirlick* (fn 36) 73, 86.

which would justify treating limitations of liability in a similar way both for contract and tort claims.[47]

When analysing the aim of tort law, one has to consider that the main purpose is compensation of harm, with the aim to re-establish an economic balance between the victim and the tortfeasor; the prevention and sanction goals are marginal or have even faded away.[48] Arguments in favour of a (partial) dispositive nature of tort law, at least in Swiss law, should, therefore, prevail.[49]

Under French law, the position is quite clear that any contractual limitation that would limit tort liability is invalid, such provisions being of internal *ordre public* (art 6 French Civil Code) and, therefore, mandatory in nature.[50] As a consequence, under French law, limitations of contractual liability clauses will in any case not be valid for tort claims.[51]

3 Interpretation of the will of the parties

If one accepts the idea that tort law is not mandatory in nature, then the focus must be on the ambit of the contractual clause itself, its validity first (as we have seen above) and then its interpretation as to its application in the concrete case. Indeed, the Federal Tribunal has underlined that determining whether a clause limiting or excluding a contractual liability is also applicable to a tort claim is first a matter of interpretation of the intent of the parties.[52] One must, therefore, look at *what the parties intended* when they agreed to such a provision.

If real and common intent cannot be established, which might often be the case, one will have to interpret the provision according to *objective factors*, ie according to *what a reasonable person would have understood by such a provision*. Could one objectively consider that, according to the principles of good faith and fair dealing, the parties intended to extend such limitation also to a tort claim?

To answer such question, one would need to take into account the following core factors:

47 *Buol* (fn 2) para 567.

48 *Werro* (fn 2) paras 6–9; *Zirlick* (fn 36) 71, goes also in that direction.

49 See also *Zirlick* (fn 36) 72

50 *Zirlick* (fn 36) 43, 92ff.

51 *L Aynès*, Droit français, in: J Ghestin (ed), Les clauses limitatives ou exonératoires de responsabilité en Europe (1991) 9.

52 DFT 130/2004 III 686, reason 4.3.1; DFT 107/1981 II 161, reason 8a; *Tercier*/*Pichonnaz* (fn 2) para 1358; *Werro* (fn 2) para 4.

a) First, the fact that the intent to exclude liability is *not primarily linked to a type of action*, but to the result, ie the absence of any obligation to pay damages for such loss. Most of the time, the idea is not to restrict a claim (or one ground) vis-à-vis another, but to allocate the risks of a contractual relationship in a manner different to what would be the case if the parties applied the statutory risk allocation. It is, therefore, difficult to see why this divergent (contractual) risk allocation should suddenly become invalid when the ground for the action changes, and is linked to a claim in tort.
b) *A limitation or exclusion of liability may be counterbalanced by a reduced price*. One might think that this is specifically linked to the contractual relationship. However, whether the claim for damages is based on contract or tort does not change the fact that the reduced price is still valid. There is, therefore, no reason why the allocation of risk deriving from the clause limiting liability should not also apply to a tort claim.

Some authors suggest that if the interpretation does not give a clear indication on its scope, the limitation or exclusion of liability should *not* apply to tort claims.[53] It is, however, difficult to adopt this view. On the contrary, if the intent is not clear, either based on a subjective or objective interpretation, then it should be presumed that the risk allocation *should be applicable to both situations* in the same way; both claims based on contract or on tort should be affected by such a valid clause. This may support the idea of a more unitarian approach to liability, and takes into account our position that tort law is often considered as being of a dispositive nature.

B The issue of specific rules on contractual liability limitations

The exclusion of any liability for defects (art 199 CO) is a specific example for an exclusion of contractual liability. Under Swiss law, in contracts for work,[54] but also according to some scholars in sales contracts,[55] a specific claim for liability for defects

53 *F Werro* in: C Chappuis/F Werro, La responsabilité civile : à la croisée des chemins, ZSR/RDS 2003 II, 384.

54 FT, Decision 4A_387/2014 (27.10.2014) reason 4.2; DFT 100/*1974* II 30 reason 2; *P Gauch*, Der Werkvertrag (6th edn 2019) para 2324; *F Chaix* in: Commentaire Romand, Code des obligations, vol I (CR CO-I) (3rd edn 2021) art 368 CO para 66; *P Tercier*/*L Bieri*/*B Carron*, Les contrats spéciaux (5th edn 2016) para 3759.

55 *S Venturi* in: Commentaire Romand, Code des obligations, vol I (CR CO-I) art 197 CO para 17; *Tercier*/*Bieri*/*Carron* (fn 54) para 645; see, however, the longstanding case law, DFT 133/2007 III 335 reason 2; DFT 108/1982 II 104; *P Higi*/*H Schönle* in: Zürcher Kommentar (ZKomm) art 197 CO para 19a; BSK-OR I/*Honsell* (fn 15) pre-Article 197–210 CO para 6.

automatically excludes a claim under general contractual rules. As a consequence, excluding liability for defects also means excluding any contractual liability.

In accordance with the Federal Tribunal's case law, such limitations have to be specific enough and interpreted restrictively.[56] If this is done, it seems difficult to consider that a tort claim falling within those limits would not be affected by those limitations as well. Parties have allocated risks and a general understanding of the contract, which justifies having a valid exclusion also for a tort claim.[57]

The tricky question is, however, whether a limitation of liability for defects is also valid for *consequential damage*, ie the damage affecting a good other than the defective good itself. This would go beyond the purpose of this report, which is related to tort liability.

C The impact of exclusion on third parties

The question whether a limitation or exclusion of liability might apply also to a third party may vary from one legal system to the other. As a matter of principle, of course, a contractual limitation of liability will only work *inter partes*, according to the principle of privity of contract. However, the legal systems have envisaged different situations in which the limitation clause may also apply to third parties.

1 Third party as tortfeasor

First, one could imagine a third party, ie a subcontractor or an auxiliary, as an author of damage affecting a victim that is in a contractual relationship with someone else, ie the main contractor or the principal; this other main contract provided for a limitation of liability.[58] The question is then whether this 'third party' tortfeasor may invoke the limitation of liability when the victim claims damages against them in tort.

Some international conventions provide for such a third party effect. This is the case in particular for the Convention on Limitation of Liability for Maritime Claims of 1976 (LLMC).[59] Article 1 paras 4 and 5 read as follows:

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56 DFT 126/2000 III 50 reason 5a; FT, Decision 4C.273/2006 (6.12.2006) reason 2.1; FT, Decision 4C.33/2004 (8.2.2006).

57 *Tercier/Pichonnaz* (fn 2) para 1358.

58 See for such analysis, *Zirlick* (fn 36) 304ff; against third party effect, *Buol* (fn 2) paras 94, 150 f.

59 See Convention on limitation of liability for maritime claims, 1976 (concluded at London on 19 November 1976), United Nations Treaty Collection No 24635; see also in Switzerland Systematic Collection 0.747.331.53.

> 4. If any claims set out in Article 2 are made against any person for whose act, neglect or default the shipowner or salvor is responsible, such person shall be entitled to avail himself of the limitation of liability provided for in this Convention.
>
> 5. In this Convention the liability of a shipowner shall include liability in an action brought against the vessel herself.

Further, parties may expressly provide for a third party to be protected by the contractual limitation of liability.[60] One could imagine that the contractual party may have acted as a direct agent of such a third party, or that the contract protects this third party either by way of a third party right relationship or a construction of a 'contract protecting a third party' (*Vertrag mit Schutzwirkung zu Gunsten Dritter)*, if applicable. The third party right relationship (art 112 CO) has been criticised by some authors because it would give only a defence based on the limitation of liability, which would be against the nature of third party rights that are intended to be related to the enforcing of claims.[61] The third party relationship is, however, rather a way to extend rights to third parties; it does, therefore, not *per se* exclude the right to extend defences to third parties.[62] Furthermore, one could also imagine a dogmatic construct of an anticipated renunciation of a claim in favour of a third party.[63] In other words, if and when a claim for damages arises against a third party, the party who could claim damages may be considered as having renounced their claim in advance when concluding the contract with such a contractual limitation clause, as long as the ambit of the damage is within the realm of what was foreseeable at the time of conclusion of the limitation clause.

If the extension to a third party is provided for by way of standard terms, this should also be valid, as long as it 'fits' into the validity requirements for standard terms.[64]

In my opinion, therefore, the extension of the limitation of liability to third parties should be recognised if it 'fits' the other limitations affecting limitation clauses.

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60 *Zirlick* (fn 36) 305f.

61 *Buol* (fn 2) paras 152, 577f; also *RH Weber*/*M Skripsky*, Vergütungen zugunsten Dritter, Zeitschrift des Bernischen Juristenvereins (ZBJV) 2003, 249f; *Zirlick* (fn 36) 304 ff, who refers extensively to Thyssen for inspiration from German law.

62 DFT 100/1974 II 368/375; *E Bucher*, Obligationenrecht Allgemeiner Teil (2nd edn 1988) 475; see also *P Krauskopf*, Der Vertrag zugunsten Dritter (2000) para 1713; see also *Zirlick* (fn 36) 307f.

63 *Weber*/*Skripsky*, ZBJV 2003, 254; *Zirlick* (fn 36) 307.

64 For German law, see *S Grundmann*, Münchener Kommentar (9th edn 2022) § 276 BGB para 183; *Zirlick* (fn 36) 311.

2 Third party as a victim

A different question is whether the clause limiting liability would also be applicable when the victim is a third party, not a party to the contractual relationship which contains the limitation.[65] Again, according to the principle of privity of contract, such contractual limitations of liability should normally not be applicable to a third party which was not party to such contract.[66] There are, however, some specific cases for which a different answer may be considered.

The dogmatic structure of a contract with protective effect to the detriment of third parties can be considered the other side of the contract with protective effect in favour of a third party (*Vertrag mit Schutzwirkung zu Gunsten Dritter*). This German construction considers third parties that are closely connected to the contracting party, such as relatives, auxiliaries or even subcontractors which are bound by instructions, to be protected by a contract given that the contractual party has some duties of protection and care.[67] The issue is, therefore, whether these third parties should also not be *affected* by such closely related contractual parties.[68] Imagine a craftsman working to repair a heater at a person's home, the contract between them excludes any liability for slight negligence. However, goods of the spouse of the contractual party have been damaged by slight negligence. The question is then whether the spouse can claim damages or whether the defence raised by the craftsman that the damage is the result of slightly negligent work would be effective. To my understanding, if the craftsman caused damage by gross negligence, then the contractual party and the spouse would be allowed to claim damages; the spouse would ground their claim on tort. This latter claim would be an *independent claim*. In the case of slight negligence, one cannot see why (and how) such (independent) claims in tort could be restricted by an agreement between third parties (in our example, the craftsman and the contractual party) when the claim is independent.[69]

If the contractual clause refers, however, explicitly or implicitly, to third parties, then one could envisage such a clause to the detriment of a third party when this third party is aware of it and one can consider, given the circumstances, that

65 See more recently *Hochstrasser* (fn 6) paras 483–508.

66 For Swiss law, see DFT 94/1968 II 151/153; DFT 111 II 472, reason 10 (question remained open); *Buol* (fn 2) para 150; *Hochstrasser* (fn 6) para 491; *Zirlick* (fn 36) 321.

67 *W Ernst* in: Münchener Kommentar (9th edn 2022) § 280 BGB para 117.

68 *Zirlick* (fn 36) 322f.

69 See also in German law *G Räcke*, Haftungsbeschränkungen zugunsten und zu Lasten Dritter, thesis Berlin 1994, Karlsruhe 1995, 152; *M Katzenstein*, Die Drittwirkung von Haftungsbeschränkungen nach § 991 Abs. 2 BGB: zugleich ein Beitrag zur Dogmatik des Eigentümer-Besitzer-Verhältnisses, Archiv für die civilistische Praxis (AcP) 204 (2004) 1–24, in particular 1–6.

the contractual party acted also on behalf of such third party.[70] This will occur only rarely. The required act should in a way equate to endorsing the agent's act (*Duldungsvollmacht* or *Anscheinsvollmacht*).

III As a conclusion: A need for more specific provisions in the PETL

Under the title, 'Defences based on justifications', art 7:101(1)(d) PETL reads as follows:

> (1) Liability can be excluded if and to the extent that the actor acted legitimately
> ...
> (d) with the consent of the victim, or where *the latter has assumed the risk of being harmed*...

One can, therefore, consider taking advantage of the contractual risk allocation (ie the fact that the contract excludes liability or limits it) to claim that the victim '*has assumed the risk of being harmed*'. There is nevertheless a need for clarification, as results from the various aspects mentioned above.

First, such provisions should determine whether or not tort law provisions are mandatory in nature.

Second, if it is agreed that tort law provisions may be dispositive in nature, the provisions should underline that the contractual limitation or exclusion of liability should be interpreted according to the intent of the parties and pursuant to the overall transaction to determine whether the contractual limitation/exclusion of liability agreed by the parties was intended or should objectively be intended to apply to tort claims.

An exclusion of liability in the contractual ambit should, however, *be presumed to apply to tort claims*, when the interpretation of the limitation of liability makes the damage fall under such tort claim.

Third, the exclusion of liability shall not be valid for intentional damage or damage resulting from gross negligence. Moreover, exclusions or limitations of liability shall not be possible for personal injury, at least when those personal injuries are not of minor importance.

Finally, limitations or exclusions of contractual liability may have an impact on third parties in some specific situations. This can arise when a claim has been assigned to that third party, who has then to comply with the limitation. It can, how-

70 *Zirlick* (fn 36) 324f.

ever, also apply when the third party is not totally independent, either because of implicit agency, or if that third party knew, or even should have known, that such limitation would be applicable to the given case. It might – in rare cases – be considered as an implicit acceptance of such limitation.

As a conclusion, I would propose that the current PETL be supplemented by a new provision, dealing with the various points discussed in this contribution. I could imagine that the following specific provision be added:

> **Art 7:101a PETL [Contractual limitations on tort liability]**
> (1) Tort liability may be limited or excluded in advance as long as the tortfeasor remains liable for unlawful intent or gross negligence, as well as for personal injuries when not of minor importance.
> (2) Unless proven otherwise, a contractual clause limiting liability between parties is presumed to also affect tort liability.
> (3) A contractual clause limiting liability may be invoked by a third party tortfeasor towards a victim which is a party to such contractual clause, where one contractual party may be considered as an agent of this third party or as having acted for its benefit. A tortfeasor who is a contractual party to such clause cannot oppose such clause to a third party claim.